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No. 09-822

IN THE

Supreme Court of the United States

CENTRA, INC. AND
DETROIT INTERNATIONAL BRIDGE CO.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In calculating an employer's withdrawal liability to a multiemployer pension fund, is it proper to include the contribution histories of former subsidiaries that have merged with the employer, even where some assets of those subsidiaries were transferred post-merger to other affiliated companies that, at the time of withdrawal, were no longer within the employer's controlled group?

RULE 29.6 DISCLOSURE STATEMENT

Respondent is not a corporation.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners have not offered any "compelling reasons" in support of their Petition for a Writ of Certiorari as required by Supreme Court Rule 10. Far from "disrupting" the "carefully balanced statutory scheme" of the Multiemployer Pension Plan Amendments Act ("MPPAA") (Pet. at 12), the result below furthers the purposes of the Act by requiring the corporate employer who incurred the pension obligations in the first instance to remain liable for any consequent withdrawal liability, thereby

protecting the plan participants and the other employers in the plan against a shortfall in funds available for the payment of benefits. That is, MPPAA is intended to assure that each employer obligated to contribute to a multiemployer plan is responsible for a fair share of the plan's unfunded vested benefits. Each employer's share—payable when the employer withdraws from the plan (hence "withdrawal liability")—is in turn measured by the employer's history of required contributions to the plan. ERISA Section 4211, 29 U.S.C. §1391.

Petitioners' position would frustrate the purposes of MPPAA by permitting an employer to shed its pension contribution history and withdrawal liability through a series of related-party transactions and transfers of meager assets into insolvent and ultimately bankrupt corporations, leaving the other employers in the plan to fund the resulting shortfall.

There is no conflict between the Seventh Circuit's August 20, 2009 Opinion and decisions of other Circuits, as Petitioners erroneously assert. None of the cases on which Petitioners rely dealt with the issue presented here, namely, whether a parent corporation that absorbs a subsidiary and becomes its legal successor by way of merger also absorbs the subsidiary's pension contribution history for purposes of calculating the combined entity's withdrawal liability. Moreover, each of the MPPAA cases upon which Petitioners rely held, as did the Seventh Circuit here, that the pension contribution histories remain with the corporate entity that incurred them, regardless of a transfer of assets, and that those histories are therefore properly included in the calculation of withdrawal liability on the date of withdrawal. So, the holdings of all of these cases are

fully consistent. Moreover, and despite Petitioners' protestations to the contrary, the Seventh Circuit's decision was not based on an "accrual" theory, but on a calculation of the liability as it existed on the date of withdrawal.

Finally, the decision below does not inject "confusion" or "uncertainty" into corporate transactions. (Pet. at 22.) The rule enunciated below is simple and fully consistent with the law in other Circuits: absent an exemption that is inapplicable here, contribution histories remain with the corporate entity that incurred the original contribution obligation notwithstanding a transfer of assets to a related entity. There is nothing "uncertain" or "confusing" about that. *Id.* Petitioners, on the other hand would substitute a complex analysis that requires contribution histories to travel in an ill-defined way with transfers of assets or "operations." That is the antithesis of "certainty." To what assets do the histories attach? When some but not all assets are transferred, how are the histories to be apportioned? If assets are sold to multiple purchasers, who inherits what history? And why should a purchaser of assets be liable for pension obligations relating to a time period *prior* to the asset acquisition? Petitioners have no ready answers for those questions, and it is therefore obvious that it is the result sought by Petitioners, not the result below, that would cause "uncertainty" and "confusion" in the marketplace.

For all of these reasons, as more fully set forth below, Petitioners' request for a writ of certiorari is without merit and should be denied.

STATEMENT OF THE CASE

Petitioner CenTra is a privately held company owned by the Moroun family. (Pet. App. at 3a.) From 1970 until 1995, Central Cartage Co. (Old Cartage) and Central Transport, Inc. (Old Transport) (collectively the "Old Subs") were subsidiaries of CenTra. (Pet. App. at 3a.) The Old Subs each had labor agreements under which they contributed to Respondent Central States Southeast and Southwest Areas Pension Fund ("Central States" or the "Fund") on behalf of certain of their employees. (Pet. App. at 3a.) Old Cartage owned Petitioner DIBC, which owned the Ambassador Bridge in Detroit, Michigan and also contributed to Central States. (Pet. App. at 4a.) U.S. Truck Company, Inc. was another company owned by the Moroun family which, until August 1996, was under common control with CenTra. (Pet. App. at 4a.) U.S. Truck also contributed to Central States. (Pet. App. at 4a.)

In 1995, CenTra created two new subsidiaries that had no assets and no operations, Central Cartage Co. of Michigan, Inc. and Central Transport of Michigan, Inc. ("New Subs".) (Pet. App. at 5a.) Then, on December 31, 1995, *the Old Subs merged into CenTra* and ceased to exist, leaving CenTra as the surviving corporation. (Pet. App. at 6a.)

Following the merger, the New Subs were renamed with the names of the Old Subs. (Pet. App. at 6a.) At some point after the merger and name change, CenTra "dropped down" certain assets into the New Subs—which consisted of a tiny fraction of the assets of the Old Subs that CenTra had acquired in the merger. (Pet. App. at 6a.) However, CenTra kept the remaining assets of the Old Subs, including 100% of the stock of Petitioner DIBC, the bulk of Old Trans-

port's motor carrier division and Crown Enterprises, a real estate subsidiary of Old Transport. (Pet. App. at 6a-7a.) In addition, CenTra retained Old Transport's freight receivables and other assets. (Pet. App. at 7a.)

MPPAA does contain a "sale of assets" exemption that will transfer contribution history from a seller to a buyer if all the provisions of that exemption are satisfied. 29 U.S.C. § 1384. However, the asset "drop down" did not meet the "stringent requirements governing asset sales under § 1384." (Pet. App. at 25a.)

On February 29, 1996, CenTra sold its stock in New Transport to U.S. Truck (which was then still under common control with CenTra). (Pet. App. at 25a.) On August 9, 1996, CenTra sold its stock in New Cartage to U.S. Truck. (Pet. App. at 25a.) Finally, on August 19, 1996, CenTra's shareholders entered into an agreement severing the controlled group relationship between CenTra and U.S. Truck. (Pet. App. at 8a-9a.)

The New Subs quickly failed. In 1997, New Transport shut down. (Pet. App. at 9a.) In 1999 New Cartage shut down. (Pet. App. at 9a.) U.S. Truck filed for bankruptcy and was liquidated soon thereafter. (Pet. App. at 9a.) Central States assessed withdrawal liability against U.S. Truck using only the contribution history incurred by the New Subs after the date of the settlement agreement. (Pet. App. at 9a-10a.) Central States did not include any contribution history of the Old Subs when assessing U.S. Truck.

Petitioner DIBC remained the last subsidiary in CenTra's controlled group that had an obligation to contribute to Central States. (Pet. App. at 9a.) Central States terminated DIBC's participation in the

Fund in November 1997 (due to a violation of Fund policy). It is undisputed that this event triggered a complete withdrawal under 29 U.S.C. § 1383(a). (Pet. App. at 14a.) Central States assessed withdrawal liability against Petitioners using the contribution histories of DIBC and the Old Subs when calculating the amount of that liability. (Pet. App. at 9a.) The amount of the pension contributions due on behalf of the employees of the Old Subs was the most significant factor in the computation of the amount of Petitioners' withdrawal liability. (Pet. App. at 16a.) The total amount of liability assessed was $14,761,082.66. (Pet. App. at 9a.)

Petitioners demanded arbitration pursuant to 29 U.S.C. 1401(a)(1). The arbitrator held that the pension obligations of the Old Subs "*traveled to CenTra by means of the merger*." (Pet. App. at 65a; emphasis added.) However, the arbitrator then relied on ERISA § 4218, 29 U.S.C. § 1398, to hold that the pension obligations of the Old Subs embarked on a further journey, first into the skinnied-down New Subs (by means of a transfer of a handful of the Old Subs' assets), and then (by means of stock transactions involving the New Subs and U.S. Truck), into a new controlled group soon destined for business failure. In this way, the arbitrator reasoned that CenTra's complicated corporate maneuvers relieved Petitioners of almost all of the withdrawal liability assessed by Central States. (Pet. App. at 74a-75a.) The arbitrator attempted to justify the movement of pension obligations *away* from CenTra (*i.e.*, after the Old Subs merged into CenTra) by holding that the transfer to the New Subs of certain minimal assets formerly belonging to the Old Subs transferred the pension obligations as well. (Pet. App. at 68a; emphasis added.)

CenTra filed an action to enforce the Award and Central States filed an action to vacate or modify the Award. These actions were consolidated. The District Court reversed the Award and reinstated the Fund's assessment of liability, holding that:

> The arbitrator committed legal error in determining that the application of § 4218 following [a merger] acted to relieve CenTra of any future withdrawal liability related to the contributions of CenTra's predecessor organizations, the Old Subs. What happened here was a reorganization in which substantial assets of the Old Subs were acquired by CenTra. The *Old Subs*' stock was not sold in a "division." Rather, the *New Subs*' stock was sold, which represented substantially less value after CenTra retained assets of the Old Subs. This kind of transaction and reorganization does not fall within the statutory language for withdrawal liability exemption.

(Pet. App. at 41a; emphasis added.)

The District Court rejected the arbitrator's interpretation of ERISA § 4218, 29 U.S.C. § 1398, as a matter of law. The District Court held that §4218 is not a general provision allowing the transfer of withdrawal liability, and that §4218 only applies "to situations where an employer *ceases to exist* following a division or other change of corporate structure." (Pet. App. at 40a; emphasis added.) The District Court concluded that CenTra did not cease to exist as a result of the merger or any other transaction and that §4218 therefore did not apply.

Specifically, the District Court held that the merger placed CenTra, as the surviving corporation, "in the shoes of the Old Subs." (Pet. App. at 41a.)

Referring to the sale of the New Subs, the District Court further held that, "This kind of transaction and reorganization does not fall within the statutory language for withdrawal liability exemption." (Pet. App. at 41a.) Therefore, the District Court vacated the Award and reinstated Central States' original assessment of withdrawal liability.

Petitioners filed an appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit issued its Opinion on August 20, 2009, affirming the District Court decision. The Seventh Circuit held that "the Old Subs' contribution histories were assumed by CenTra *in the merger* and stayed with CenTra because none of the later steps in the reorganization met the MPPAA's statutory requirements for avoiding withdrawal liability." (Pet. App. at 11a; emphasis added.) The Seventh Circuit explained that:

> Here, the successor to the Old Subs is CenTra, not the New Subs. CenTra has pointed to nothing in the record, and we have found nothing, supporting the assertion that CenTra turned around and transferred the Old Subs to the New Subs, contribution histories and all. What *are* in the record are balance sheets and financial journal entries showing how carefully CenTra picked out specific assets and liabilities and transferred *only those* assets and liabilities to the New Subs. There is no reason to believe that the Old Subs' contribution histories went with those assets and liabilities by fiat.

(Pet App. at 23a.) The Seventh Circuit also specifically rejected CenTra's claim that this decision rested on an "accrual theory" of withdrawal liability. (Pet. App. at 25a-26a.)

The panel decision was unanimous. Petitioners filed a Petition for Rehearing *en banc*. Not a single judge of the Seventh Circuit voted to hear the case *en banc*. (Pet. App. at 123a.)

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners have established no compelling reason under Supreme Court Rule 10 why this Court should review the decision below. The Opinion of the Seventh Circuit is fully consistent with both the letter of MPPAA and the policy reasons behind it. MPPAA was intended to protect employers in a multiemployer plan from the withdrawal of employers who had not fully funded future benefit obligations. Through the mechanism of withdrawal liability, which requires withdrawing employers to fund the future pension obligations at the time of withdrawal, MPPAA protects the plan participants and the employers who remain in the plan against pension funding shortfalls. The decision below does nothing more than require the withdrawing employer to pay its withdrawal liability obligations, notwithstanding that employer's complex series of related-party transactions through which Petitioners now claim to have shed that liability and to have transferred it to insolvent, and ultimately bankrupt, entities.

The Opinion of the Seventh Circuit does not create any conflict with any decision of any Court of Appeals. The decision below is perfectly consistent with the law in other Circuits, none of which have considered the question presented here, to wit, whether a parent corporation that *merges* with a subsidiary and becomes that subsidiary's successor in

interest inherits the subsidiary's contribution history for purposes of calculating withdrawal liability.

Moreover, the Seventh Circuit did not apply an "accrual theory" of withdrawal liability, as Petitioners erroneously contend, nor did Respondent ever argue such a theory. The question confronting the Court below was not when withdrawal liability was incurred—that was undisputed—but how it was to be calculated as of the withdrawal date and what contribution histories were properly included at that time.

Central States argued, and the Seventh Circuit held, that the pension contribution histories of the Old Subs should be used when computing the liability of Petitioners because CenTra, as the successor by merger to the Old Subs, was still in the "controlled group" on the date of the withdrawal. This is a simple, clear holding that injects no "confusion" or "uncertainty" into the law of corporate transactions. Review by this Court is unwarranted.

I. THE DECISION BELOW IS FULLY CONSISTENT WITH THE PROVISIONS AND PURPOSES OF MPPAA

MPPAA was intended to protect multiemployer plan participants and contributors, as well as the Pension Benefit Guaranty Corporation, by imposing withdrawal liability for unfunded benefits on employers who terminate their participation in the plan. As the Seventh Circuit stated in the Opinion below:

> MPPAA, the most extensive amendment of ERISA to date, "overhaul[ed]" ERISA's Title 4, the plan termination insurance system. John H. Langbein, Susan J. Stabile & Bruce A. Wolk, *Pension*

> *and Employee Benefit Law* 92 (4th ed. 2006). In addition to protecting employers who remain in a plan, the MPPAA protects the Pension Benefit Guaranty Corporation (PBGC), the agency charged with implementing and interpreting the statute, from the enormous burden of insuring pension benefits, all in the interest of ensuring that employees will be able to collect their benefits upon retirement. Langbein, Stabile &Wolk, *Pension and Employee Benefit Law* at 69. Prior to the enactment of ERISA, an employer's liability to a multiemployer plan was governed by the terms of the collective bargaining agreement, which typically lacked any provision for contingent liability. *Id.* at 69-70. ERISA Title 4 imposed liability upon withdrawal by a substantial employer from a multiemployer plan, and the MPPAA imposed strict technical rules governing such withdrawals. *Id.*; *see* 29 U.S.C. §§ 1381(b)(1), 1391.

(Pet. App. at 11a-12a.)

The decision below is fully consistent with MPPAA and advances that statutory purpose by requiring the contribution history to remain with the corporate entity that incurred the contribution obligation, regardless of whether that entity may have transferred assets in a related-party transaction.

Petitioners argue that the decision below conflicts with 29 U.S.C. § 1398, which states that withdrawal shall not be deemed to have occurred simply because of a change in corporate structure that does not interrupt employer contributions. That argument is misplaced. Neither Central States, nor the Courts below, ever contended that withdrawal occurred as a result of CenTra's so-called reorganization in 1995.

It was undisputed that withdrawal was triggered nearly two years later when the last contributing member of the CenTra controlled group, DIBC, ceased contributions to the plan in 1997. The question was not when the withdrawal occurred; the question was the amount of withdrawal liability attributable to Petitioners.

Indeed, § 1398 specifically provides that a "a successor or parent corporation or other entity resulting" from a corporate restructuring "shall be considered the original employer." The successor corporation resulting from the restructuring here (a merger) was CenTra, and the Seventh Circuit therefore properly held that it was the original employer for purposes of calculating the withdrawal liability attributable to the Old Subs.

Petitioners also claim that CenTra's transfer of certain assets into the New Subs somehow transferred the Old Subs' contribution histories as well. Again, that argument flies in the face of the express provisions of the statute. MPPAA has a specific and very limited exemption for asset sales which imposes very strict requirements. These include requirements that the transactions be at arm's length to an unrelated entity, that the purchaser specifically assume the withdrawal liability in writing, and that bond be posted to secure that obligation. 29 U.S.C. § 1384. None of those requirements were met here, and Petitioners therefore cannot claim that their related-party transfers of assets somehow relieved CenTra of the Old Subs' contribution histories, which it acquired as their successor in interest pursuant to the merger.

II. THE DECISION DOES NOT CREATE ANY CONFLICT BETWEEN THE COURTS OF APPEALS

Petitioners attempt to characterize the Seventh Circuit Opinion as resolving a pure question of law. (Pet. at 11.) In fact, the Opinion involves the application of law to very specific—and highly unusual—corporate transactions. None of the other cases cited by Petitioners involved the application of federal law to a merger or to any transaction even remotely similar to the transactions at issue here, (i.e., a merger followed by Byzantine related-party "reorganization" gymnastics). The Seventh Circuit's decision is therefore not in conflict with the cited decisions from other Courts of Appeals. In fact, the Seventh Circuit's legal analysis is entirely consistent with those other decisions.

A. There is no conflict because no other Court of Appeals has ever resolved the question decided in the Seventh Circuit Opinion

The question before the Seventh Circuit was "whether CenTra's controlled group, which withdrew from the plan in 1997, was properly assessed withdrawal liability based on the contribution histories of two CenTra subsidiaries that disappeared in the 1995 reorganization." (Pet. App. at 3a.)

No prior case from any Court of Appeals had ever addressed the question of whether amounts contributed by subsidiaries which merge into their parent should be included when calculating the amount of the parent's subsequent withdrawal liability.

1. The Seventh Circuit Opinion resolved the question of the consequences of a merger on the allocation of pension contribution history

The Seventh Circuit Opinion relies upon the fact that CenTra never sold the two subsidiaries that had historically participated in Central States prior to 1996 (the Old Subs.) Instead, CenTra merged with the Old Subs on December 31, 1995—leaving CenTra as the surviving corporation and the successor in interest to the Old Subs. (Pet. App. at 5a-6a.) CenTra sold the stock of different subsidiaries (the New Subs) to an affiliated company—U.S. Truck. (Pet. App. at 8a.) While Petitioners attempt to downplay this distinction by referring vaguely to CenTra's "trucking subsidiaries" or "divested operations," the fact of the merger is both undisputed and central to the analysis. (Pet. "Question Presented"; Pet. at 8.)

Following these complex transactions in the evidentiary record can be confusing because the New Subs were renamed with the names of the Old Subs shortly after the merger of the Old Subs into CenTra. However the Old Subs and the New Subs were far from identical. As the Seventh Circuit carefully noted, the New Subs had fewer assets than the Old Subs and far more limited operations. (Pet. App. at 6a-8a.) The Seventh Circuit succinctly and accurately summarized these differences by stating that "The Old Subs disappeared into CenTra and *only pieces of the Old Subs were transferred to the New Subs*." (Pet. App. at 22a; emphasis added.)

The holding of the Seventh Circuit is simply stated. As the survivor of the merger, CenTra inherited all the attributes and obligations of the Old Subs, including their historical pension contribution obliga-

tions. (Pet. App. at 20a.) Petitioners cite no decision from any other Circuit to the contrary, and Respondents have found none.

2. No other Court of Appeals has ever addressed the consequences of a merger on the allocation of pension contribution history under MPPAA

This was a case of first impression. Contrary to Petitioners' use of selective quotations from the decisions which they cite, no other court has ever addressed withdrawal liability in the context of the kind of merger transaction at issue here. A brief discussion of the facts of each case cited by Petitioners will show that the claim of a conflict is misplaced.

Petitioners rely primarily on *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W. D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988). In *Central Michigan Trucking*, a parent corporation (Fuqua) held the stock of a subsidiary (Interstate) which contributed to a multiemployer pension fund. The parent distributed the stock of the subsidiary to the shareholders of the parent corporation. After this stock distribution, the subsidiary was an independent, publicly held corporation. When the subsidiary later failed, the multiemployer pension fund argued that the former parent was liable for the withdrawal liability of the subsidiary. The pension fund's theory of liability was that "any business which was an employer or member of a control group as defined under the Act must be held accountable for a contingent withdrawal liability for the time period during which it was an employer or member of the control group." *Id.* at 1108-09. The Sixth Circuit rejected this argument and held that the contribution history of

the subsidiary remained with the subsidiary. Unlike the situation here, the subsidiary in *Central Michigan Trucking* had not merged with the parent corporation. Because the subsidiary retained its separate corporate identity, the former parent was not liable for the subsidiary's withdrawal liability. The Sixth Circuit did not address what happens to the pension contribution history of a subsidiary that merges into its parent.

Petitioners also rely on *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306 (5th Cir. 1988). *Godchaux* involved a breach of warranty claim under state law and only reached the MPPAA question to clarify the scope of the warranty. The shareholders of a corporation (Nadustco) sold all the stock in that corporation to a different and unrelated corporation (CTI.) One of the selling shareholders gave various warranties to the buyer in connection with the sale. The buyer later sued that shareholder for breach of warranty for failing to disclose possible pension liabilities. The Fifth Circuit held that the withdrawal liability had not existed on the date of the warranty and that there was no need to disclose the potential for withdrawal liability under generally accepted accounting principles. Therefore, the Fifth Circuit held that there was no breach of warranty. That is a far cry from the situation presented here. *Godchaux* did not involve a merger and the Fifth Circuit did not interpret 29 U.S.C. § 1398. Thus, the Fifth Circuit did not address what happens to the pension contribution history of a subsidiary that merges into its parent.

Next, Petitioners cite *IUE AFL-CIO Pension Fund v. Barker and Williamson, Inc.*, 788 F.2d 118 (3rd Cir. 1986). The facts in *Barker and Williamson* are

very different from the facts before the Seventh Circuit. There, the Third Circuit held that two corporations were under common control on the date of withdrawal because the sole shareholder of one corporation (Sentinel) either owned or had an option to buy all of the stock of the other corporation (B & W.) Therefore, the Third Circuit held that "the district court properly decided that Sentinel and B & W were members of a controlled group. We will therefore affirm the district court's judgment that Sentinel is liable for B & W's delinquent [withdrawal liability] payments to the Fund." *Id.* at 130. In *Barker and Williamson* there was no change in ownership of a corporation, no transfer of operations and no merger of corporations. Therefore, the Third Circuit did not interpret 29 U.S.C. § 1398 or address what happens to the pension contribution history of a subsidiary that merges into its parent.

Petitioners also cite *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corporation*, 1995 WL 791371 (D.C. Del. 1995). In *Federal Express* a parent corporation (Tiger) sold all the stock of a subsidiary (Hall's) to another corporation in two installments. The District Court held that the former parent was not liable for the withdrawal liability of the subsidiary because both purchase price installments had been paid, and the sale of the subsidiary therefore completed, prior to the date of withdrawal. The District Court held that, for purposes of withdrawal liability, the contribution history followed the subsidiary which had historically contributed to the pension fund. There was no merger. Therefore, the District Court did not address what happens to the pension contribution history of a subsidiary that merges into its parent.

Finally, Petitioners cite *CMSH Company, Inc. v. Carpenters Trust Fund of Northern California*, 963 F.2d 238 (9th Cir. 1992). In that case the Ninth Circuit held that one corporation (CMSH) was not liable for the withdrawal liability of another corporation (Framing) that later took over its operations under the existing collective bargaining agreement. CMSH had completely ceased covered operations prior to the effective date of MPPAA. The Ninth Circuit found that CMSH was not liable for the withdrawal liability because the two corporations were not under "common control" within the meaning of MPPAA and that the "alter ego" doctrine was inapplicable. The Ninth Circuit never reached the question of the allocation of the contribution history that had accrued prior to the transfer of operations because that contribution history was incurred prior to the effective date of MPPAA and irrelevant to the assessment of withdrawal liability. Obviously, this case does nothing to advance Petitioners' claim of a conflict between the Circuits.

Therefore, the Courts of Appeals have *not* applied the law differently to identical, or even similar, facts. No prior decision has ever addressed the consequences of a merger of a subsidiary corporation into a parent corporation for purposes of assessing withdrawal liability and no conflict of authorities is presented.

B. The legal analysis of the Seventh Circuit is consistent with the analysis of the other Circuits

All of the decisions cited by Petitioners are factually distinguishable. However, all of the decisions cited by Petitioners respected the traditional principles of corporate law and held that contribution

history follows the corporation that was originally obligated to make those contributions.

The Seventh Circuit Opinion is fully consistent with these decisions. It holds that the contribution history of the Olds Subs remained with CenTra as the survivor of the Old Subs by merger. The Seventh Circuit noted that:

> The safe harbor provisions give structure to the MPPAA that comports with general corporate law principles. Looking to those provisions in allocating withdrawal liability therefore should respect parties' expectations regarding the effect of a corporate transaction on the corporation's obligations.

(Pet. App. at 18a-19a.) Not only is there no direct conflict between the Circuits, there is no inconsistency at all. The legal analysis of the Seventh Circuit is in complete harmony with the analysis of the other Circuits.

1. No Court of Appeals has ever held that pension contribution history transfers with "operations"

In their attempt to avoid the withdrawal liability claimed in this case, Petitioners came up with the novel claim that pension contribution history flows with "operations."

Petitioners never define what they mean by the term "operations," but the multiple references to the "contribution base" suggests that Petitioners mean the *prospective* employment relationships or labor agreements with the affected bargaining units, and some minimal collection of assets sufficient to permit a corporation to limp along for a decent interval

before liquidating or filing for bankruptcy. Petitioners never explain why a business which assumes the prospective duty to contribute to a pension plan on behalf of a given bargaining unit would *necessarily* assume the historical pension contribution obligations as well. The usual rule is that a transfer of assets transfers assets only, but not liabilities. *Central States Pension Fund v. Nitehawk*, 223 F.3d 483, 492 (7th Cir. 2000). And even if buyer of assets is deemed to be a successor to the seller under labor law, the successor liability of the buyer does not relieve the seller of the original liability or defeat the rights of third-party creditors. *Chaveriat v. Williams Pipe Line*, 11 F.3d 1420,1425 (7th Cir. 1993).

However, the concept of "operations" (whatever Petitioners may mean by that term) is irrelevant because withdrawal liability does not attach to "operations." Withdrawal liability is always the liability of an "*employer*." 29 U.S.C. 1381(a)("if an employer withdraws from a multiemployer plan . . . then the employer is liable to the plan."). An employer is defined in 29 U.S.C. §1002(2)(B)(5) as a "person." A person can only be an "individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. §1002(2)(B)(9). All of these are business entities.

Withdrawal liability is not a contagious disease. There is nothing in MPPAA which even suggests that operations act as a "carrier" to transmit withdrawal liability from one business entity to another. CenTra cites no authority for its novel proposition that the contribution history of an entity is somehow transferred with the entity's "operations," and nothing in MPPAA supports Petitioners' theory.

All but one of the decisions cited by Petitioners examined stock transactions involving an intact corporate entity. Any transfer of "operations" in those cases was incident to the sale of the corporation's stock. *See*, *Central Michigan Trucking, Inc.*, 857 F.2d at 1108 (distribution of stock to shareholders); *Godchaux*, 846 F.2d at 308 (sale of stock); *Barker & Williamson*, 788 F.2d at 123-24 (option on corporate stock); *Federal Express*, 1995 WL 791371 at *2-3 (sale of stock).

The only case cited by Petitioners that did address a transfer of operations (albeit without a merger) was *CMSH Company, Inc.*, 963 F.2d at 242. However, in that case the operations were transferred prior to the effective date of MPPAA and were not relevant to the calculation of withdrawal liability. So that case does nothing to support Petitioners' argument.

Moreover, contrary to Petitioners' suggestion, the Seventh Circuit Opinion did not involve the transfer of the "operations" of the Old Subs as an intact or complete business unit. The Seventh Circuit specifically found that CenTra dismembered the assets of the Old Subs following their merger into CenTra, and that CenTra retained most, if not all, of the profitable assets. (Pet. App. at 6a-9a.) The fact that the "operations" of the Old Subs had *ceased to exist* in any cohesive form was part of the basis for the panel's rejection of CenTra's claim that the transfer of partial assets to the New Subs was a "division" within the meaning of 29 U.S.C. §1369. (Pet. App. at 21a-22a; "The Old Subs disappeared into Centra and only pieces of the Old Subs were transferred to the New Subs.")

The Seventh Circuit found that the key "reorganization" transaction was the merger. (Pet. App. at 19a-20a.) The panel's finding that CenTra inherited the

historical contribution obligations of the Old Subs as the survivor of the merger is consistent with both ordinary principles of corporate law and with the other Circuit decisions.

2. The Seventh Circuit did not apply an accrual theory of withdrawal liability

Petitioners' primary claim is that the Seventh Circuit unwittingly applied an accrual theory of withdrawal liability, despite the fact that the Opinion carefully analyzed the cases cited by Petitioners and rejected the accrual theory. The Seventh Circuit specifically responded to CenTra's claim that assigning the contribution history of the Old Subs to CenTra would be functionally equivalent to adopting the discredited accrual theory of withdrawal liability, stating:

> Our holding is not based on this theory, which takes as its premise the idea that a parent cannot shed a subsidiary's contribution histories by engaging in a transaction covered by one of the safe harbor provisions discussed above. As should be clear from what we have said thus far, we agree entirely with CenTra and the courts that have considered this argument that it lacks merit. *See Teamsters Pension Trust Fund of Philadelphia v. Central Michigan Trucking, Inc.*, 857 F.2d 1107, 1109 (6th Cir. 1988) (rejecting the fund's argument that a change in corporate structure under § 1398 did not relieve the predecessor parent company from withdrawal liability that had "accrued" during its ownership of the former subsidiary); *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 310–11 & n.12 (5th Cir. 1988). A parent *can* shed its subs' contribution histories (or, more correctly, a parent

> can avoid having those contributions used in the calculation of the parent's withdrawal liability) by engaging in such a transaction. *CenTra simply failed to engage in the necessary transaction here.*

(Pet. App. at 25a-26a; emphasis added.) Therefore, the Seventh Circuit Opinion rested on the specific facts of this case. The Opinion did not adopt an accrual theory.

The Seventh Circuit found that the corporations that had incurred the contribution obligations (the Old Subs) were liable for the withdrawal liability associated with those contributions. CenTra, as the successor to the Old Subs, inherited that contribution history. Therefore, this is not an accrual theory but a theory of *direct* liability based on CenTra's status as a successor by merger to the Old Subs. As the Seventh Circuit explained:

> it is not quite right to characterize contribution histories as "accruing" until the occurrence of a reorganization covered by a safe harbor. They do not "accrue" so much as they form the basis for any eventual calculation of the employer's withdrawal liability. That means that if the employer never withdraws . . . that employer will never be assessed withdrawal liability. Therefore, no contribution histories have "accrued"; any liability is contingent on withdrawal.

(Pet App. at 26a-27a.)

Central States never claimed that liability "accrues" as contributions are historically made and never claimed that liability can be assessed against companies who were no longer part of the controlled group at the time of withdrawal. Under the Seventh

Circuit Opinion, Petitioners' liability does not depend on any theory of "accrual" liability. CenTra was part of the controlled group that withdrew in 1997. The obligations of the Old Subs had been assumed by CenTra as the surviving corporation in a merger, and were not released or impaired as a result of the asset transfer to the New Subs. (Pet. App. at 27a.) Accordingly, the Old Subs' obligations remained with CenTra and properly formed part of the calculation of CenTra's withdrawal liability *at the time of withdrawal in 1997*. The Opinion was not based on a theory of "accrued" liability.

3. The Seventh Circuit Opinion is consistent with earlier decisions because it calculated Petitioners' withdrawal liability solely as of the date of withdrawal

Adjunct to its claim that the Seventh Circuit accidentally adopted an "accrual theory" of withdrawal liability, Petitioners also claim that the Seventh Circuit did not determine liability solely as of the date of the withdrawal. That assertion is without merit.

As the Seventh Circuit observed, the assessment of withdrawal liability is a three step process. First, the pension fund determines whether the employer had withdrawn from the plan. (Pet. App. at 12a.) Second, the fund calculates the amount owed by the withdrawing employer. (Pet. App. at 15a.) Third, if relevant, the fund allocates the liability among multiple employers. (Pet. App. at 17a.) Under the MPPAA allocation method adopted by Central States, a pension fund—at the time of the withdrawal event—determines a withdrawing employer's *pro rata* share of the fund's unfunded vested benefits by looking at

the required contributions of the employer during the ten years prior to the withdrawal. (Pet. App. at 16a.)

The examination of the historical contribution obligation during this step in the assessment process requires a retroactive analysis. However, conducting a retroactive examination at the time a withdrawal occurs (as required by MPPAA) does not mean that a pension fund is claiming that actual liabilities had been continually accruing during that period.

The Seventh Circuit was very clear that the contribution history was still in the CenTra controlled group on the date of withdrawal:

> the Old Subs' contribution histories were assumed by CenTra in the merger and stayed with CenTra because none of the later steps in the reorganization met the MPPAA's statutory requirements for avoiding withdrawal liability.

(Pet. App. at 11a.) The Seventh Circuit further explained that:

> In the present case, the Old Subs are the predecessor and CenTra is the successor. When the fund calculated CenTra's withdrawal liability, it was therefore appropriate to consider the Old Subs' contribution histories; the fund did not assess any liability against the Old Subs. Likewise, when the fund initially calculated U.S. Truck's withdrawal liability, it excluded the Old Subs' contribution histories on grounds elaborated here: CenTra's drop down of assets to the New Subs did not transfer the Old Subs' contribution histories to the New Subs, so those contribution histories stayed with CenTra instead of transferring to U.S. Truck in the sale of the New Subs' stock.

(Pet App. at 27a.) The Seventh Circuit therefore properly determined the amount of Petitioners' withdrawal liability solely as of the date of withdrawal.

III. THE SEVENTH CIRCUIT OPINION DOES NOT CREATE UNCERTAINTY BECAUSE THE OPINION REAFFIRMS WELL-ESTABLISHED PRINCIPLES OF ORDINARY CORPORATE LAW

Petitioners conclude by making a brief argument that the Seventh Circuit Opinion will allegedly create uncertainty which will interfere with corporate transactions. (Pet. at 22.) However, the Seventh Circuit Opinion is based on the effect of a merger, which is a traditional corporate transaction that should be familiar to all employers.

Despite claiming to be the champions of "certainty," Petitioners offers no rule to guide future allocations of withdrawal liability that would offer any certainty. Apparently, Petitioners propose a "single employer" (or "controlled group") rule that would insulate *any* corporate shuffling of assets and liabilities from judicial review so long as part of that shuffling took place within the same corporate family.

Why that should be the rule, when the opportunities for chicanery are highest in related-party transactions, is never explained. MPPAA was designed to strengthen a pension fund's ability to protect employee pensions. Petitioners' proposed interpretation leaves a pension fund with *less* protection than an ordinary trade creditor. It is inconsistent with the Congressional intent to let a group of related companies conduct transactions that would, if conducted by strangers at arm's length, be seen as an impermissible separation of assets and liabilities, and in the process avoid their MPPAA liability.

Under Petitioners' approach, moreover, any buyer of corporate assets or "operations" would have to examine the pedigree of each individual asset to verify that the purchase did not inadvertently expose the buyer to withdrawal liability that silently moved along with the asset transaction.

The Seventh Circuit Opinion offers a rule of decision that could not be more clear and that could not establish more certainty. Pension contribution history always follows the corporation or business entity that originally incurred the contribution obligation. Pension contribution history does not attach to assets (or to so-called "operations" loosely related to the pension obligation)—unless the parties comply with MPPAA's single sale of asset exemption set forth at 29 U.S.C. § 1384. Petitioners admittedly did not qualify for this exemption and they do not rely on this provision in the Petition. The Seventh Circuit Opinion provides greater certainty to business planners than the alternative proposed by Petitioners.

CONCLUSION

Petitioners have not offered any compelling reasons why this Court should grant the Petition. Therefore, Respondents request that the Petition be denied.

Respectfully submitted,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

CENTRA, INC. AND DETROIT INTERNATIONAL BRIDGE CO.,
Petitioners,

V.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Central States' brief in opposition attempts to obscure that the Seventh Circuit adopted the accrual liability theory to find a former employer liable even though the employer was not part of the controlled group at the time actual withdrawal occurred. The Seventh Circuit's adoption of the accrual liability theory is contrary to the rule followed in the Third, Fifth, and Sixth Circuits.

The Arbitrator explained in his detailed 59-page opinion that "Central States' case is premised on the theory that, at all time prior to the reorganization, the Old Subs were accruing withdrawal liabilities, and that these accruals never left the CenTra controlled group." (App. 67a). The Arbitrator rejected this theory, noting that such a result was directly contrary to the statute and the holdings of federal circuits. (App. 68a-69a & n.44). Despite the opposition's attempts to claim otherwise, the Seventh Circuit's decision cannot be reconciled with the decisions of other federal circuits. The Seventh Circuit adopted an accrual theory in all but name. It treats the withdrawal liability as sufficiently existing to attach itself to the parent corporation at the time of the reorganization, despite the fact that no withdrawal event occurred until long after the employer was severed from its prior controlled group. This theory, under any name, is contrary to the statutory scheme and the rule in at least three other circuits.

Absent review by this Court, employers and plans will be forced to forum shop among the circuits because withdrawal liability will accrue in the Seventh Circuit and not accrue in the Third, Fifth,

and Sixth Circuits. Congress did not intend to include federal circuit forum shopping as part of sound corporate reorganization planning when it adopted the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). To the contrary, the intention was to bring uniformity and predictability to pension liability and corporate planning.

ARGUMENT

1. Central States claims that the Seventh Circuit applied the same legal standard as applied in the other circuits. Opp. 9-10, 15, 18-26. According to Central States, "[t]he Seventh Circuit's Opinion rested on the specific facts of this case. The Opinion did not adopt an accrual theory." Opp. 23. That is not true. The Seventh Circuit's decision treats withdrawal liability as if it were a present liability that exists before actual withdrawal has occurred. *See* App. 27a. Central States describes the Seventh Circuit's "holding" as follows: "As the survivor of the merger, CenTra inherited all the attributes and obligations of the Old Subs, including their historical pension contribution obligations." Opp. 14-15. According to Central States, "this is not an accrual theory but a theory of direct liability based on CenTra's status as a successor by merger to the Old Subs." Opp. 23. There is no statutory or case law support for this finding.

As the Arbitrator explained, this is an accrual theory in all but name because it treats contribution histories as present liabilities throughout the pre-withdrawal period. (App. 67a-69a & n.44). The accrual theory – rejected by every circuit court to have considered its merit – is that contribution

histories are existing liabilities awaiting assignment. *See Teamsters Pension Trust Fund v. Cent. Mich. Trucking, Inc.*, 857 F.2d 1107, 1110-11 (6th Cir. 1988); *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 310-12 (5th Cir. 1988).

"The accrual theory is . . . flawed in its interpretation of when liability for withdrawal arises." *Teamsters Pension Trust Fund v. Fed. Express Corp.*, No. Civ. A 86-304, 1995 WL 791371, at *9 (D. Del. Dec. 27, 1995), *aff'd sub nom. Flying Tiger Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 96 F.3d 1432 (3d Cir. 1996). MPPAA requires that a snap-shot approach be used for determining withdrawal liability: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, *then the employer* is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a) (emphasis added). As the Fifth Circuit explained, "[i]f we construe this statute according to its most natural reading, then we must conclude that *withdrawal liability does not exist* until an employer actually withdraws from a multiemployer pension plan." *Godchaux*, 846 F.2d at 310 (emphasis added). The Seventh Circuit below determined just the opposite, *i.e.*, that the withdrawal liability existed in 1995 – two years before the withdrawal event – and was "transferred" to CenTra in the reorganization.

The Fifth Circuit squarely rejected "[t]he argument that withdrawal liability is merely a method of imposing an already determined unfunded vested liability . . . ." *Godchaux*, 846 F.2d at 313. Yet this argument formed the basis for the Seventh

Circuit's holding here. The panel below found that "contribution histories . . . form the basis for any eventual calculation of the employer's withdrawal liability" and that this "liability is contingent on withdrawal." App. 27a. In other words, the employer carries as a present liability the total undiscounted pension obligations that would come due if there is a withdrawal event. If that were the rule, then employers would have been required to carry withdrawal liability on their balance sheets as debt. Of course, that proposal has never been accepted. *See* App. 68a ("Before [a withdrawal event], there is no liability to be carried either as a liability on the employer's books or as an asset by the Fund.").

Central States pretends that the Seventh Circuit merely conducted a "retroactive examination" at the time of withdrawal to determine what contribution histories should be included, without using an accrual theory. Opp. 10, 25. This is semantics without difference. Central States has conceded that withdrawal liability is the liability of an "employer." Opp. 20. Therefore, to find CenTra liable two years after U.S. Truck and CenTra were no longer in the same controlled group, the "retroactive examination" is the application of the rejected "accrual theory" of withdrawal liability.

Before and after the internal restructuring, CenTra and its subsidiaries were all members of the same controlled group, and each part of that controlled group would have been treated as "the employer" if a withdrawal had occurred at that

time.[1] However, after the New Subs were sold to U.S. Truck and U.S. Truck left the controlled group, CenTra was no longer "the employer" with regard to the trucking operations. Thus, when CenTra subsequently withdrew from the plan, it was no longer liable for withdrawal liability for the trucking operations. *See IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986) (citing 29 U.S.C. § 1301(b)(1)). The Seventh Circuit's contrary holding thus violated the statute and the holding of other circuits by imposing withdrawal liability on a former employer that was no longer the statutory employer at the time of withdrawal.

2. Central States does not dispute that other courts of appeals have rejected the accrual liability theory. *See* Opp. 15-16 ("The Sixth Circuit rejected this [accrual theory] argument and held that the contribution history of the subsidiary remained with the subsidiary."). Central States is reduced to reconcile the Seventh Circuit's holding with other circuits by attempting to factually distinguish all accrual cases. *See, e.g.,* Opp. 17 ("The facts in *Barker & Williamson* are very different from the facts before the Seventh Circuit.").

None of the procedural and factual differences that Central States invokes are relevant. For example, Central States insists that the other courts

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[1] Central States claims that the New Subs had "far more limited operations" than the Old Subs. Opp. 14. However, the Seventh Circuit found that "[a]ll of the Old Subs' union trucking operations (including drivers and other employees) were transferred to the New Subs." App. 7a.

"did not address what happens to the pension contribution history of a subsidiary that merges into its parent." Opp. 16-17. The Seventh Circuit's approach to that question is contrary to the holding of the other circuits by treating the withdrawal liability as existing without a triggering event at the time of the merger to allow Central States to attach the liability to CenTra, a member of the withdrawing employer's former controlled group. As even Central States acknowledges, "[t]he Fifth Circuit held that the withdrawal liability *had not existed* on the date of the warranty and that there was no need to disclose the *potential* for withdrawal liability . . . ." Opp. 16 (emphasis added). This case is simply a different factual application of the same accrual theory of liability that has been rejected by all courts other than the Seventh Circuit.

3. Central States repeatedly suggests that CenTra engaged in a collusive transaction designed to avoid its withdrawal liability obligations. Central States asserts that CenTra sought to "shed" that liability through a series of "related-party transactions" and have them "transferred . . . to insolvent, and ultimately bankrupt, entities." Opp. 9. According to Central States, "opportunities for chicanery are highest in related-party transactions . . . ." Opp. 26.

Central States has ignored that the Arbitrator rejected Central States' argument that the transactions at issue were a sham intended to evade or avoid withdrawal liability. (App. 104a). The Seventh Circuit did not disturb that portion of the Arbitrator's finding. *See* App. 11a n.5. In so doing, the Seventh Circuit clarified that it was applying an

accrual theory of withdrawal liability rather than punishing a former controlled group member that had attempted to evade or avoid withdrawal liability by corporate trickery. As the petition explained, the statute contains an explicit standard for dealing with potential abuses by employers to evade or avoid withdrawal liability. *See* Petition at 13-14 (citing 29 U.S.C. § 1392(c)).

4. Central States claims that the Seventh Circuit's opinion offers a clear and certain rule: "Pension contribution histories always follow the corporation or business entity that originally incurred the contribution obligation." Opp. 27. But this proffered rule directly conflicts with the controlled group rule that is central to the withdrawal liability provisions of ERISA. *See* 29 U.S.C. § 1301(b)(1); *see also* Petition at 12-13. It therefore adds more confusion and uncertainty into the issues.

This Court has never addressed the propriety of an accrual liability theory under MPPAA. The Seventh Circuit's opinion creates a conflict in circuits concerning whether the accrual liability theory is appropriate in the absence of a finding that a former employer took steps to evade or avoid withdrawal liability. This issue is critical to allow appropriate corporate planning and to avoid the forum shopping that the decision of the Seventh Circuit has unintentionally invited.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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